

Randy K. Dix
Randy Dix Law Office
320 11th Avenue
Helena, MT 59601
(406) 996-1171
randy@randydixlaw.com

Daniel P. Buckley
Buckley Law Office, P.C.
125 West Mendenhall, Suite 201
Bozeman, Montana 59715
406-587-3346
dbuckley@danbuckleylaw.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION

The ESTATE OF GARY WAXBOM, by
and through his Personal Representative
Elizabeth Waxbom and ELIZABETH
WAXBOM, individually,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Cause No. _____

COMPLAINT

COME NOW the Plaintiffs, by their counsel of record, for their claims for

Estate of Gary Waxbom, et al., v. United States of America

1 relief, do herby allege as follows:

2 **PARTIES**

- 3
- 4 1. At all times relevant hereto, Gary Waxbom, now deceased, was a citizen of
- 5 Lincoln County, Montana, and resided before his death in Libby, Montana.
- 6
- 7 2. An Estate for Mr. Waxbom has been established and filed in the Nineteenth
- 8 Judicial District, Lincoln County, Montana, cause number, DP-15-122. Mrs.
- 9 Waxbom has been appointed the personal representative for the Estate of
- 10 Gary Waxbom.
- 11
- 12 3. At all times relevant hereto, Plaintiff Elizabeth Waxbom was a citizen of
- 13 Lincoln County, Montana, and resided in Libby, Montana. Elizabeth
- 14 Waxbom was married to Mr. Waxbom.
- 15
- 16 4. The claims against Defendant United States of America arise from the health
- 17 care services provided by Northwest Community Health Center to Gary
- 18 Waxbom. Northwest Community Health Center is located in Libby,
- 19 Montana, and is a federally supported health center.
- 20
- 21
- 22 5. The negligent acts and omissions that are the subject of this action were
- 23 committed by Defendant Northwest Community Health Center's agents and
- 24 employees while acting within the course and scope of their employment.
- 25

26 **JURISDICTION AND VENUE**

- 27
- 28 6. Northwest Community Health Center is a federally supported health center.

Estate of Gary Waxbom, et al., v. United States of America

Pursuant to the Federally Supported Health Center Assistance Act, exclusive jurisdiction lies with the federal district court pursuant to the Federal Tort Claims Act. *See* 42 U.S.C. § 233(g)-(n); and, 28 U.S.C. §§ 2671-80.

7. The jurisdiction of this Court is invoked pursuant to said statutes and 28 USC § 1346(b), *et seq.*, more commonly known as the Federal Tort Claims Act, in that agents and employees of Northwest Community Health Center, acting within the scope of their employment, committed negligent acts as hereinafter more specifically alleged. This Court has exclusive jurisdiction over tort claims brought against the United States pursuant to 28 USC §§ 1346(b), 2671, *et seq.*

8. Plaintiffs filed an administrative tort claim on May 4, 2015, for relief with the appropriate Federal agency, the US Department of Health & Human Services, in a timely manner under the Federal Tort Claims Act, 28 USC § 2675(a). On May 18, 2015, Plaintiffs' counsel received correspondence from the US DHHS confirming receipt of the claim. The US DHHS did not substantively respond or otherwise make a final disposition to the administrative tort claim within 6 months. Pursuant to 28 USC § 2675(a), the lack of further response is considered a denial of the claim; and, as such, this tort claim is timely brought pursuant to 28 USC §§ 2675 and 2401(b), and case law interpreting the same.

1 9. All of the events, errors, omissions and occurrences, which give rise to this
2 lawsuit, took place and were committed in Lincoln County, Montana.
3 Therefore, venue of this action is appropriate in the Missoula Division
4 pursuant to Local Rules 1.2(c)(5) and 3.2.
5

6 **NATURE OF THE CASE**
7

8 10. Gary Waxbom was 64 years old when this claim was brought. Mr. Waxbom
9 died shortly thereafter on June 1, 2015. His Estate and his surviving wife
10 bring this claim arising from the belated diagnosis and treatment of non-
11 small cell lung cancer (adenocarcinoma) of Mr. Waxbom.
12

13 11. Mr. Waxbom sought primary care from Northwest Community Health
14 Center, and was attended and cared for by its employees and/or agents, Dr.
15 Charles LaGoy and Physician's Assistant Scott Lacefield during all times
16 relevant hereto. Dr. LaGoy was the primary care giver for Mr. Waxbom.
17 Based on the records, PA Lacefield first took over Mr. Waxbom's care in or
18 about October 2013.
19
20
21

22 12. The provider(s) failed to appreciate that Mr. Waxbom, who had a long
23 history of smoking along with significant, unexplained weight loss over a
24 short period of time, and pain, had significant indicators for possible
25 malignancy. Each of these indicators, individually and together, should have
26 alerted the providers to a high index of suspicion for malignancy, prompting
27
28

1 them to order imaging studies for screening and/or detecting malignancy.

2 13. This claim arises from the failure to refer Mr. Waxbom for lung cancer
3 screening. As discussed below, lung screening guidelines in 2013, in
4 addition to dramatic weight loss in 2013, should have prompted the
5 provider(s) to discuss and counsel Mr. Waxbom regarding screening benefits
6 (versus risks), and refer Mr. Waxbom for lung cancer screening (i.e., chest
7 radiographs and/or low-dose chest CT).
8

9
10 14. The earliest that Mr. Waxbom became aware that he had cancer was
11 approximately March 12, 2014. This is the first time Mr. Waxbom became
12 aware or should have been become aware that he potentially had cancer.
13

14
15 15. By the time of Mr. Waxbom's diagnosis (initial finding of an invasive mass
16 was on March 12, 2014), the cancer was stage IV and had metastasized.
17 Though treatment was initiated, Mr. Waxbom's cancer progressed, moving
18 into his brain.
19

20 16. On June 1, 2015 Mr. Waxbom died from the cancer.
21

22 17. Mr. Waxbom lost the chance to treat his cancer earlier and to treat his cancer
23 more successfully.
24

25 18. The negligence of the medical providers at Northwest Community Health
26 was a cause in bringing about these damages/injury/death and/or was a
27 substantial factor in bringing about the damages/injury/death, and these
28

1 damages/injuries/death would not have occurred without said negligence.

2 **CLAIMS FOR RELIEF**
3 **AND ALLEGATIONS OF NEGLIGENCE**
4 **(WRONGFUL DEATH AND SURVIVORSHIP)**

5 19. Mr. Waxbom sought frequent primary care from Northwest Community
6 Health Center, including care for chronic and intractable thoracic back pain,
7 secondary to a workplace accident in 2001.
8

9 20. Mr. Waxbom presented to Northwest Community Health Care on a regular
10 basis, and was under the care of Dr. Charles LaGoy. The chart regularly
11 notes that Mr. Waxbom was historically a heavy smoker, and the chart also
12 reflects a significant amount of unintentional weight loss over a relatively
13 short period of time.
14
15

16 21. PA Lacefield took over the direct care of Mr. Waxbom in October 2013.
17 Previously, Mr. Waxbom had been able to discontinue his longtime
18 narcotics pain control for his back injury. However, beginning in December
19 2013, Mr. Waxbom was reporting significant change to the quality and
20 intensity of his pain. On December 9, 2013, Mr. Waxbom presented to PA
21 Lacefield with complaints of back pain (primarily right-sided), dyspepsia
22 (chest discomfort secondary to gas) and shortness of breath when lying on
23 his side.
24
25
26

27 22. On December 16, 2013, Mr. Waxbom presented to PA Lacefield with
28

1 complaints of worsening right-sided lumbar pain and muscle pain in that
2 area (10/10 on the pain scale).

- 3 23. On December 19, 2013, Mrs. Waxbom called and reported that Mr.
4 Waxbom was having “breathing problems with tramadol”. On December
5 20, 2013, Mrs. Waxbom called and reported that Mr. Waxbom was having
6 difficulties sleeping, and suffering from anxiety symptoms. Mr. Waxbom
7 made the same report on December 26, 2013.
- 8 24. On January 28, 2014, Mr. Waxbom presented to PA Lacefield for follow-up.
9 PA Lacefield was the first to document concerns over weight loss during this
10 visit. That note indicates, “Patient has documented **unintentional weight**
11 **loss** of greater than 35 pounds in the past 6 months. Patient does have
12 tobacco use history....” (Emphasis added). Mr. Waxbom’s weight was 219
13 pounds on that date (down from 285 pounds approximately 1 year earlier).
14 The note further indicates that, although Mr. Waxbom has changed his diet
15 (decreasing sugars), he is, “...still eating adequate number of calories....”
16 Under Mr. Lacefield’s assessment, it is noted, “**Unintentional weight**
17 **loss**...Rapid weight loss in patient with significant smoking history, **so**
18 **obvious concern for malignancy**....” (Emphasis in note). Laboratory
19 work and colonoscopy was ordered. The colonoscopy was normal in all
20 relative aspects. No imaging or chest radiographs were ordered.
21
22
23
24
25
26
27
28

1 25. On February 20, 2014, Mr. Waxbom presented to PA Lacefield for back
2 pain once again. No discussions appear in the record regarding malignancy
3 concerns.

4
5 26. By March 7, 2014, Mr. Waxbom's back pain was becoming intolerable and
6 was radiating down his right leg. Mr. Waxbom reported to the Emergency
7 Room, and an MRI was ordered.

8
9 27. On March 10, 2014, Mr. Waxbom reported to PA Lacefield, for follow up to
10 his ER visit. An MRI was ordered for "low back pain". No discussions
11 appear in the record regarding malignancy concerns.

12
13 28. A MRI was completed on March 12, 2014. The radiologist reported a
14 "destructive mass involving the right ilium", already extending into the
15 adjacent soft tissues, i.e., the right iliopsoas muscle. The radiologist was
16 suspicious of this mass for metastatic malignancy or plasmacytoma. The
17 radiologist was less suspicious that the findings were representative of a
18 primary bone tumor.

19
20
21
22 29. On March 12, 2014, Mr. Waxbom presented to PA Lacefield, wherein the
23 MRI findings were discussed, and PA Lacefield noted a concern for lung
24 cancer as the potential primary. CT scans of the chest, abdomen and pelvis
25 were ordered.

26
27
28 30. CT scans were completed on March 14, 2014. The significant findings

1 consisted of: (1) a large mass along the right hilum, extending into the right
2 upper lobe, “most likely is an underlying primary malignancy”, (2) two
3 smaller lesions (one in the left lung and one in the right upper chest),
4 possibility metastatic, (3) mediastinal adenopathy involvement, and (4)
5 confirmation of the large destructive lesion in the right ileum, extending into
6 the soft tissues. The radiologist reported that the large lesions in the right
7 hilum and the right ileum are “aggressive in appearance”.

10 31. A biopsy of the right ilium lesion demonstrated adenocarcinoma consistent
11 with the lung lesion as the primary. The lung cancer was stage IV (i.e., non-
12 small cell lung cancer metastasized to the hip).
13

14 32. As indicated in the Northwest records, Mr. Waxbom was a historically
15 “heavy” smoker, reportedly 11-20 cigarettes/day per the medical records.
16 Before his death, Mr. Waxbom’s perpetuation testimony was taken. Mr.
17 Waxbom testified that he started smoking at age 12, and averaged 1 - 1 ½
18 packs per day until his 60s (wherein he has attempted to curb the use of
19 cigarettes). This historical use of cigarettes roughly equates to 50 pack-
20 years on the low end (i.e., approximately 50 years of smoking multiplied by
21 1 pack per day).
22

23 33. Prior to these events, in January 2013, the American Cancer Society
24 published guidelines that recommend physicians discuss lung cancer
25
26
27
28

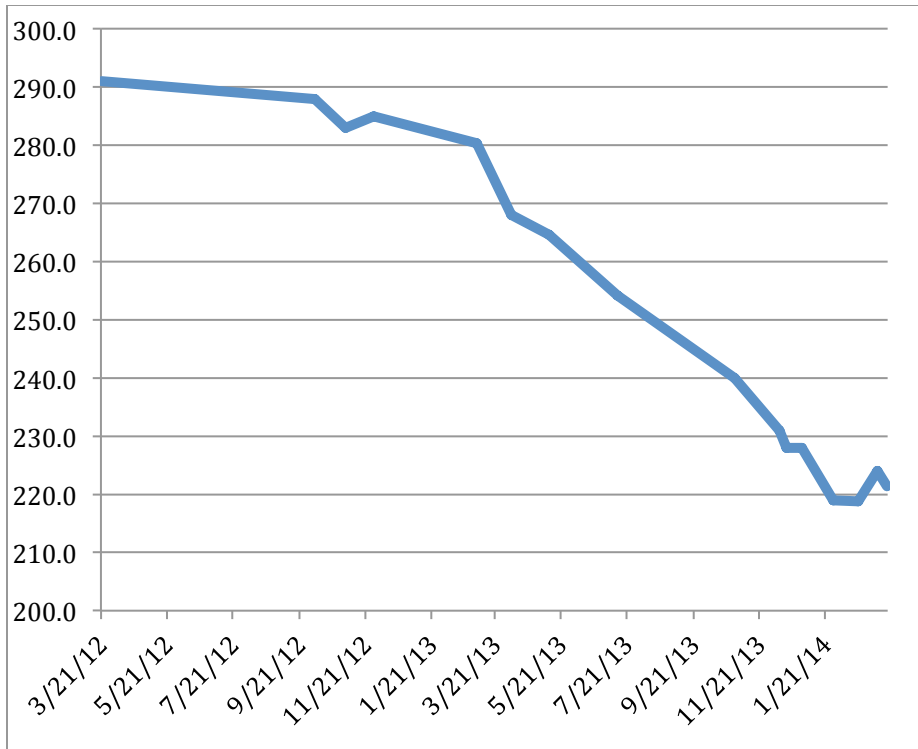
1 screening with their patients who meet the following criteria: (1) patients
2 aged 55 to 74, (2) who have a smoking history equivalent to a 30-year pack
3 history, and (3) who currently smoke or have quit within the past 15 years.

4
5 If these criteria are met, the patient should be recommended to pursue
6 screening after discussion with and consent of the patient.
7

8 34. Further, the U.S. Preventive Task Force issued these same recommendations
9 in a draft statement in July 2013 (except modifying the age range to 55-79
10 years old). Further, these recommendations were discussed in the American
11 Academy of Family Physicians (AAFP) in July 2013.
12

13 35. Mr. Waxbom was, at the relevant times herein, between the age of 55-74,
14 had more than a 30 pack-year history, and had not quit smoking in the prior
15 15 years. However, during his care and treatment at Northwest, Mr.
16 Waxbom was not counseled or advised as to lung cancer screening, and was
17 not referred for lung cancer screening, despite these guidelines for screening
18 patients who are between the ages of 55-74 with a 30 pack-year history or
19 more and who have not quit within the prior 15 years.
20
21
22

23 36. Furthermore, during his care at Northwest, Mr. Waxbom's weight was taken
24 and recorded regularly. The following chart reflects and demonstrates that
25 Mr. Waxbom presented with a dramatic weight loss over a relatively short
26 period of time in 2013:
27
28



Date	Weight (lbs.) per Northwest's records
3/21/12	291.0
10/5/12	288
11/2/12	283
11/28/12	285
3/4/13	280.4
4/5/13	268
/10/13	264.6
7/12/13	254.2
10/29/13	240
12/9/13	231
12/16/13	228
12/30/13	228

1	1/28/14	219
2	2/20/14	218.8
3	3/10/14	224
4	3/19/14	221.4

5
6 37. The American Cancer Society states that unexplained weight loss of 10
7 pounds or more may be the first sign of cancer, which happens most often
8 with certain cancers, including lung cancer. According to American
9 Academy of Family Physicians, unintentional weight loss includes more
10 than a 5% reduction in body weight within 6-12 months, and that
11 malignancy is attributable to 19-36% of patients with such weight loss. Per
12 the AAFP, one of the leading causes of unintentional weight loss is lung
13 cancer.
14

15
16
17 38. Mr. Waxbom, at the relevant times herein, unintentionally lost significant
18 weight in a short period of time.
19

20 39. The provider(s) did not discuss or counsel Mr. Waxbom as to his significant
21 weight loss over a short period of time as a possible indicator of malignancy,
22 nor does it appear that the provider(s) considered that said weight loss
23 should have prompted them to hold a high index of suspicion of malignancy
24 (especially when coupled with Mr. Waxbom's long history of heavy
25 smoking).
26
27
28

1 40. The providers also failed to appreciate that Mr. Waxbom's pain had
2 increased and changed in December 2013. This dramatic increase in pain
3 should have alerted the providers that urgent work-up of this symptom was
4 necessary, which would have led to earlier imaging and identification of his
5 cancer/lesions.
6

7
8 41. Following the initial CT scans in March 2014, additional imaging to stage
9 the cancer (look for additional masses) was undertaken. Initially, there was
10 no evidence of intracranial metastasis. Imaging of the masses in the pelvis
11 and chest was done regularly. There was initially some reduction of the
12 large hilum mass in the right lung. On June 19, 2014, a 3 mm lesion was
13 identified in the frontal lobe. The lesion did slightly decrease with the
14 therapy (radiation), as documented on July 24, 2014. Imaging from October
15 21, 2014, showed that the lung masses had increased in size and number.
16

17
18
19 42. Mr. Waxbom began care with Dr. Ryan Roop, oncologist, in March 2014,
20 who initiated chemotherapy and radiation treatments. Although the
21 treatments seemed to initially halt the disease, the cancer did continue to
22 progress and further metastasize. By September 2014, Dr. Roop determined
23 that there had been definite interval progression of the cancer and
24 recommended cessation of the chemotherapy. Focus was turned to
25 maintenance therapy, balanced with quality of life. The terminal nature of
26
27
28

1 the disease was discussed with Mr. Waxbom in October 2014.

2 43. Mr. Waxbom died on June 1, 2015.

3 44. The provider(s) herein deviated from the standard of care by, without
4 limitation:

5
6 a. Failing to appreciate that Mr. Waxbom was an appropriate patient to
7 counsel and refer for lung cancer screening, given his history of smoking
8 and his age, and the guidelines discussed above;

9
10 b. Failing to appreciate and hold a high index of suspicion that Mr.
11 Waxbom's significant and unintentional weight loss in a short period of time
12 was a significant indicator of possible malignancy, especially given his
13 history of heavy smoking and his age, and failing to refer Mr. Waxbom for
14 chest radiographs and/or other imaging;

15
16 c. Failing to appreciate that Mr. Waxbom's changed pain quality and
17 intensity was an indicator of a change in his health, and failing to work-up
18 this change, such as with imaging; and,

19
20 d. To preserve the issues, by failing to properly monitor and oversee the
21 care of Mr. Waxbom, in particular, by Dr. LaGoy failing to properly oversee
22 the care of Mr. Waxbom by PA Lacefield, as it related to the matters set
23 forth herein.
24
25
26
27
28

1 45. As with most types of cancer, delay in diagnosis and appropriate treatment
2 can and does frequently permit distant metastasis, advancement of the
3 disease process and prognostic alteration for the worse.
4

5 46. Had the provider(s) not departed from accepted standards of care that govern
6 their respective specialty training and experience, Mr. Waxbom would have
7 avoided the consequence of stage IV lung cancer; and/or, had the provider(s)
8 not departed from the accepted standards of care that govern their respective
9 specialty training and experience, the underlying condition of Mr. Waxbom
10 would not have been aggravated to a significant but un-apportionable
11 degree.
12
13
14

15 47. The substandard care rendered in this case either caused or substantially
16 contributed to Mr. Waxbom's disease.
17

18 48. Pertinent to the causation doctrines articulated in both relevant Montana case
19 law and statute, Mr. Waxbom also relies upon the doctrines of loss of
20 chance.
21

22 49. Plaintiffs have suffered significant special and general damages.
23

24 50. Plaintiffs suffered damages as a result and cause of the negligence
25 complained of herein. The acts, omissions, and errors complained of herein
26 were a cause and/or a substantial factor (a legal causation issue for the Court
27 to determine) to the damages, injuries, and death.
28

1 WHEREFORE, Plaintiffs pray as follows:

- 2 1. For all actual and compensatory damages, including special and general
3 damages;
4
5 2. For costs and expenses of suit as are allowed by applicable law;
6
7 3. For prejudgment interest on all items so calculable under applicable
8 law;
9
10 4. For such further and additional relief which this Court deems just and
11 proper.

12 RESPECTFULLY SUBMITTED and DATED this 23rd day of December, 2015.

13 BUCKLEY LAW OFFICE, P.C.
14

15 By: /s/ Daniel P. Buckley
16 Daniel P. Buckley
17 Attorneys for Plaintiffs
18
19
20
21
22
23
24
25
26
27
28